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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

In re A.G. et al., Persons Coming Under
the Juvenile Court Law.

SACRAMENTO COUNTY DEPARTMENT OF HEALTH
AND HUMAN SERVICES,

Plaintiff and Respondent,

v.

G.G.,

Defendant and Appellant.

C064660

(Super. Ct. Nos.
JD227330, JD227331)

The juvenile court issued an order terminating the parental rights of father G.G., Sr., as to minor A.G. (born 2003) and selecting adoption by maternal relatives as the permanent plan. It ordered legal guardianship with the same relatives as to minor G.G., Jr. (born 1994), who had objected to the severing of parental rights, and terminated his dependency. (Welf. & Inst. Code, § 366.26, subds. (b)(1) & (b)(2); unspecified section references that follow will be to this code.)

The father's notice of appeal from the order (§ 395) refers

to both case numbers, but it specifically challenges only the termination of his parental rights to A.G. He raises a single procedural claim in his briefing. He argues that the juvenile court erred in quashing a subpoena directed to A.G., and in precluding him from eliciting her testimony at the permanency planning hearing. He contends this violated his right to due process because this restricted him from developing evidence that supported the "continued benefit" and "sibling bond" exceptions to the termination of parental rights (§ 366, subds. (c)(1)(B)(i) & (c)(1)(B)(v)). We affirm the order.

FACTS AND PROCEEDINGS

Given the nature of the argument on appeal, we need not set forth the facts underlying these proceedings in much detail. In April 2008, an argument between the father and his wife (the mother of the minors) was escalating; he sent the minors to the son's bedroom. After the mother threw a glass at the father and cut his face, the father responded by choking her and repeatedly punching her in the head after she fell to the ground. This severed her cerebral spinal nerve, which resulted in her death. The father fled to Visalia, where he surrendered to authorities the next day. As the jurisdictional social study report noted, five-year-old A.G. was aware that her father caused her mother's death as a result of slapping the mother, even though the minor had not personally witnessed the incident.

The juvenile court detained the minors and ordered that the father not have any contact with them. The Sacramento County

Department of Health and Human Services (DHHS) filed petitions alleging that the minors came within section 300, subdivisions (b) and (g), and placed the minors in foster care. The juvenile court sustained jurisdiction over the minors after the father submitted the matter on the jurisdictional report. The now-incarcerated father then waived the provision of reunification services. (§ 361.5, subd. (b)(14).) The juvenile court adopted the proposed findings in the dispositional report, removing the minors from their father's custody and placing them in foster care with a maternal great-aunt and her husband (who had been involved in the upbringing of both minors from their births, and who were interested in guardianship or adoption). It also ordered that the father was not to have any in-person visitation with either of the minors, but could have mail and phone contact. Over the following months, the father spoke with the minors about twice a week on the phone.

The juvenile court held an initial permanency-planning hearing in October 2008, at which point it continued the matter on the recommendation of DHHS. At a subsequent hearing, it ordered permanent placement of the minors with the great-aunt and her husband with a goal of legal guardianship. The juvenile court also ordered in-person visitation between the father and G.G., Jr. (who desired it, and for whom the various evaluators thought it would be beneficial), which the great-aunt was to supervise to prevent any discussion of the pending criminal proceedings. Based on the representation that "nobody believes that it's appropriate for [A.G.] to visit her father in jail"

given her youth, the juvenile court ruled that it did not think in-person visits at the jail with the father were in her best interests. The juvenile court also ruled at the hearing that supervised phone and mail contact could continue with both minors.

In mid-2009, the juvenile court held a hearing on the issue of visitation. G.G., Jr., had been having in-person visitation with the father at the jail every few weeks. DHHS had not attempted to facilitate in-person visitation with A.G. in light of the juvenile court's previous ruling. Before the hearing, the juvenile court had ordered a supervised contact between the father and A.G., but she refused to go with her brother. At the hearing, father's counsel was granted a continuance to evaluate new materials that DHHS had submitted. Father's counsel shortly afterward dropped the request for modification of visitation without elaboration, father's sentencing and commitment to state custody perhaps having made the matter moot. (We take judicial notice on our own motion of Sacramento County Superior Court records showing that the father received a six-year prison sentence in June 2009 after pleading no contest to voluntary manslaughter.)

At the second permanency-planning hearing in January 2010, the report noted that G.G., Jr., was maintaining mail contact with the father and would like to see him again; A.G., however, continued to disclaim any interest in having contact with her father. In accordance with the wishes of G.G., Jr., the great-aunt and her husband were willing to accept legal guardianship

of him, and they desired to adopt A.G. (which was her request, after expressing her understanding of what adoption involved). At the father's request, the court set a contested hearing.

In his pre-trial statement, the father identified two factual issues for trial: whether A.G. would benefit from a continued relationship with her father, and whether termination of his parental rights and adoption would interfere with her sibling relationship. He also included both minors on his list of proposed witnesses. Counsel for the minors moved to quash the subpoena for A.G. and opposed her attending or testifying at the hearing. Her counsel contended neither minor could supply relevant testimony on the contested issues, and provided a statement from the therapist who had treated A.G. in about 75 sessions from July 2008 to October 2009 (at which point she had become acceptably stable and well adjusted). The therapist asserted that the minor was fearful of testifying, and the therapist believed it would undo the progress A.G. had made in therapy and cause her symptoms of anxiety to rearise.

At the hearing, the court first excluded G.G., Jr., from testifying on grounds of a lack of relevance. It then solicited testimony from A.G.'s therapist. The minor on her initial placement with her relatives had symptoms of anxiety, tearfulness, sleep disorders, fearfulness of being left alone, excessive "clinginess," and enuresis (both nocturnal and diurnal). The therapist had successfully treated her, and discharged her from further therapy in October 2009 as having met all goals. Although the therapist could not say for

certain, she believed the stress of testifying could retrigger the minor's problems. Even if the minor were to testify in chambers without confronting her father, the therapist thought "pointed" questioning could stir up her fears again. The social worker also testified A.G. has told her of being afraid of her father and not wanting to see him.

The court found that the minor had a fragile emotional state that should not be put at risk for the limited value at best of having her testify about a bond with a father whom she had not seen or contacted in nearly two years, which would hardly outweigh the benefits of a permanent placement through adoption. It thus granted the motion.

Father's counsel called only the father as a witness. He noted that he did not have any objection to a guardianship for his son, but he objected to adoption of his daughter. He acknowledged that he had not seen his daughter since he was taken into custody, even though he had wanted visitations from her. He nonetheless continued to send both of them letters. He had lived with the minors all of their lives, and was very close to them. They were also close to each other. He wanted them to live with him again on his release from prison (which he anticipated happening in early 2013), as he thought this would be in their best interest.

The juvenile court did not dispute the father's love for A.G. or his desire to maintain his legal relationship with her. However, it could not find any evidence that adoption would interfere with her sibling relationship, or that her tie to her

father outweighed her right to a permanent and stable family tie with the great-aunt and her husband.

DISCUSSION

Skipping over the father's discussion of general statutory and constitutional elements of due process that are undisputed, we come to his claim that the exclusion of a minor's testimony violates a parent's right to due process where no other evidence is available and the parent did not have access to the minor before the hearing. (*In re Amy M.* (1991) 232 Cal.App.3d 849, 865-868 (*Amy M.*)). He contends the three factors that *In re Jennifer J.* (1992) 8 Cal.App.4th 1080, 1089 (*Jennifer J.*) lists for determining whether a juvenile court can apply an exception to the *Amy M.* principle are distinguishable, because (with respect to the first two factors) A.G.'s testimony was not cumulative and would have had a material effect on the issue of her bond with her father. In this regard, he suggests that it was necessary for the court to hear whether she missed her father, was afraid of his custodial situation rather than him, and understood that adoption could result in never seeing him again. He also asserts that it was necessary to hear whether she understood that she would have a different legal status with the father than her brother, in order to resolve the issue of interference with sibling ties. Based on these speculations, he contends the error was not harmless beyond a reasonable doubt. As for the third factor, he argues that there was insufficient evidence that testifying in court or in chambers would have been

harmful to A.G., because the therapist did not testify that harm was certain to result and did not have a current evaluation of her mental state at the time of the second permanency-planning hearing.

Unlike *Amy M.*, which involved excluding a minor from the jurisdictional/dispositional hearing (232 Cal.App.3d at p. 863), the father did not have an unbridled right to call A.G. at the implementation hearing. The statutory presumption is that minors will *not* be present for such hearings (*Jennifer J.*, *supra*, 8 Cal.App.4th at p. 1085) unless a minor or counsel for the minor requests the minor's presence, or the court orders the minor's presence (§ 366.26, subd. (h)(2)). Therefore, absent the father overcoming this presumption with an adequate showing establishing the factors in *Jennifer J.*, A.G.'s presence was not part of the process to which the father was due.

The minors, under the juvenile court's order, were ordered to live in the same household at least until G.G., Jr., is over 18 (should he adhere to his present intention of living with the father on the latter's release from prison in 2013). That they may not have the same legal parents does not affect their biological or emotional ties with one another, nor is there any evidence of any interference with their propinquity otherwise. Thus, the "sibling bond" exception to adoption is not even implicated on the evidence in this case, and A.G.'s testimony could not as a result have any possible material effect. Consequently, this cannot be a basis for the father's claim of a violation of due process.

As for whether A.G.'s testimony was necessary to convey her wishes and desires regarding her bond with her father and the extent to which it outweighed her interest in a stable and permanent placement, or would have a material effect on this issue, the implementation report made clear that she did not want to see her father and wanted her great-aunt and husband to adopt her (after expressing her understanding of what adoption involved). The father did not present a scintilla of evidence suggesting that A.G. retained a bond with him (or even had any desire to see him) despite his absence of two years after he killed her mother that was sufficiently stronger than the ties she had with her prospective adoptive parents to justify the juvenile court disregarding the presumptive choice of adoption as the permanent plan. Nor, for that matter, was there any evidence to suggest that A.G.'s understanding of the consequences of adoption were mistaken. Her testimony, therefore, would not add anything to her extrajudicial expression of her preferences in the matter, and would not have any material effect on the issue. In the utter absence of these first two factors, any deficiency the father might perceive in the evidence of psychological harm to the minor from testifying in court or in chambers is beside the point.

DISPOSITION

The order terminating father's parental rights to A.G. is affirmed.

HULL, Acting P. J.

We concur:

BUTZ, J.

CANTIL-SAKAUYE, J.